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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-203013

DATE: September 15, 1981

MATTER OF: Zinger Construction Company, Inc.

DIGEST:

Army should revise earthwork specifications to be used in future solicitations to clarify when the Army will permit equitable adjustments under the Differing Site Conditions clause when latent physical conditions differ materially from those indicated in the solicitation.

Zinger Construction Company, Inc. (Zinger), protests the award to G & C Enterprises, Inc. (G&C), under invitation for bids (IFB) No. DACA51-81-B-0033 by the Army for construction of a bulk oil storage system at Fort Dix, New Jersey. Zinger contends that, because the earthwork specifications required clarification, resolicitation is required. We conclude that Zinger's protest is meritorious.

Regarding excavation, the IFB provided that "no consideration will be given to the nature of the materials encountered." Before bid opening, Zinger orally told the Army that this provision, and several other earthwork provisions dependent upon it, would require bidders to increase bid prices to cover possible extra cost resulting from the presence of unexpected materials. The Army referred Zinger to information cited in the IFB containing soil boring data, which reflected that only sand, silt, and gravel were present. The Army representative explained that this provision was used without objection in prior solicitations and that the provision essentially makes it the contractor's responsibility to do the work at the bid price "whether he encountered sand, clay, rock, or any combination of these materials."

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Zinger also complained that the Army's earthwork specifications rendered meaningless the IFB's general provision entitled "Differing Site Conditions," which is a standard provision permitting an equitable adjustment when latent physical conditions differ materially from those indicated in the contract. The Army representative had explained to Zinger that the general provision was meaningful and could be invoked where applicable. Zinger was not satisfied that the IFB notified all bidders when it would be applicable, so Zinger protested here.

The Army received notice of Zinger's protest 3 days prior to bid opening. The Army reports that sufficient time was not available to issue clarification and that, contrary to the IFB's requirement, Zinger did not raise its question in writing in sufficient time to permit a response to reach all potential bidders prior to scheduled bid opening. Since the Army considered clarification to be unnecessary, bid opening proceeded as scheduled. Eight bids were received. Zinger did not bid. G&C's bid was below the Government estimate and the Army made award to G&C.


In the Army's report on Zinger's protest, the contracting officer explained that the Army intended to give no consideration for the material encountered except as provided under the Differing Site Conditions clause. The contracting officer stated that excavation was estimated to be about 1 percent of the total cost for the project. The Army did not report the percentage for the balance of the earthwork. Finally, in the Army's legal opinion, the IFB referred all bidders to the type of soil to be encountered (but not rock), precluding the need for contingencies, because substantive changes in the nature of the excavated material would be the proper subject of a modification pursuant to the Differing Site Conditions clause. G&C's interpretation appears to be in accord with the Army contracting officer's interpretation.

We conclude that the earthwork specifications--notifying bidders that no consideration would be given to the nature of the materials encountered--are not consistent with the Army's stated intent to provide consideration under the Differing Site Conditions clause

if the materials encountered differ materially from the IFB's soil boring data. In our view, the ambiguity of the specifications is demonstrated by the Army's inconsistent interpretations. Therefore, we cannot adopt the Army's position that the earthwork specifications and the Differing Site Conditions clause can be read together to provide that consideration would be available under the Differing Site Conditions clause. Accordingly, the earthwork specifications required revision to advise all bidders of the Army's intent.

By letter of today to the Secretary of the Army, we recommend that the Army revise the language of its earthwork specifications to eliminate the lack of clarity in future solicitations. A recommendation for additional corrective action regarding the instant procurement is not warranted. First, the procurement deficiency appears to affect only a minor percentage of the overall project. Second, contrary to the IFB's provisions, Zinger did not notify the contracting officer in writing about the problem with the specifications in sufficient time to permit clarification. Third, the award was made in good faith and under urgent circumstances because the low bid was about to expire and G&C would not agree to extend its bid acceptance period. Fourth, G&C's price was reasonable; G&C interpreted the provisions as the Army intended them to be interpreted; and the award as made will satisfy the Government's needs. Fifth, we have received no indication that the seven other bidders shared Zinger's concern, indicating that the Government obtained adequate competition and that the other bidders were not prejudiced. Sixth, G&C has begun performance and termination of G&C's contract would result in additional cost to the Government and ultimately delay the completion date of this project. Accordingly, we do not believe that termination of G&C's contract and readvertisement would be in the best interests of the Government. See Norfolk Conveyor Division of Jervis B. Webb Company; E.C. Campbell, Inc., B-190433, July 7, 1978, 78-2 CPD 16.

Protest sustained.


Acting Comptroller General
of the United States

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

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September 15, 1981

The Honorable John O. Marsh
The Secretary of the Army

Dear Mr. Secretary:

Enclosed is a copy of our decision of today sustaining the protest of Zinger Construction Company, Inc., concerning invitation for bids No. DACA51-81-B-0033 issued by the Army Corps of Engineers for construction of a bulk oil storage system at Fort Dix, New Jersey.

In the future, the Army should revise the earthwork specifications to reflect when the Army will permit equitable adjustments under the Differing Site Conditions clause when latent physical conditions differ materially from those indicated in the solicitation.

Please advise our Office of the action taken on this recommendation.

Sincerely yours,

A handwritten signature in cursive script, reading "Milton J. Forster".

Acting Comptroller General
of the United States

Enclosure